Filed 10/30/17 P. v. Torrence CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WILLIE A. TORRENCE et al., Defendants and Appellants.	A142592 (Alameda County Super. Ct. No. 171910)
In re WILLIE A. TORRENCE et al., on Habeas Corpus.	A150345, A150186

Defendants Willie Torrence and Lawrence Denard appeal judgments convicting them of, among other things, one count of first degree murder and two counts of attempted murder arising out of a gang-related drive-by shooting. On appeal, and in related habeas corpus petitions, defendants assert numerous errors and violations of their constitutional rights. With respect to the vast majority of their contentions, we find no error. To the extent there were errors in the court's evidentiary rulings, arising largely from subsequent changes in decisional law, we find no prejudice in light of the overwhelming admissible evidence of defendants' guilt both as to the offenses charged and the gang enhancements. Accordingly, we shall affirm the judgment and summarily deny the habeas petitions.

Factual and Procedural History

On July 10, 2013, Denard and Torrence were charged with murder (count 1, Pen. Code,[1] § 187), attempted murder (counts 2 and 3, §§ 187, 664), shooting from a motor vehicle (counts 4 and 5, § 12034), and possession of a firearm by a felon (count 6 (Denard) and count 7 (Torrence), § 12021.) As to counts 1 through 5, enhancement allegations under section 12022.53 were alleged for the personal discharge of a firearm and discharge of a firearm against Denard and Torrence respectively and gang enhancements under section 186.22 were alleged against both defendants. The information alleged further under section 667.5, subdivision (b) that both defendants had suffered one prior prison term.

The following evidence was presented at trial:[2]

On August 8, 2011, Cynthia was sitting in her car in front of a grocery store on International Boulevard near 64th Avenue in Oakland. A three-year-old boy was being pushed in his stroller by his mother. Cynthia saw a car that looked like a "Neon" driving by at approximately 15 to 20 miles per hour, about one car length in front her. She saw a dreadlocked, dark-skinned African-American man reaching an arm with a gun out of the passenger's window of the Neon. She heard about 10 gunshots. Cynthia then heard the boy's mother shouting that her son had been shot.

Cynthia got out and saw two African-American men lying on the ground with gunshot wounds. She picked up and tried to aid the young victim, but he died before the ambulance arrived. Cynthia identified the Neon in photographs taken from a nearby surveillance camera.

The two adult victims were Jerome Williams and Robert Hudson. Williams testified that he left Oakland to avoid testifying and had been arrested for failure to appear as a witness in the case. Williams explained that for the last 14 or 15 years there had been a feud between some people in the "65th Avenue Village" and the "69th

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[1] All statutory references are to the Penal Code unless otherwise noted.

[2] To protect the privacy of the witnesses in this case, we refer to them by their first names whenever possible.

Avenue Village" housing projects. He and Hudson had both lived in the 65th Village for 15 to 20 years. Williams has "65" tattooed on his arm. He was afraid to testify and be labeled a "snitch." Testifying in front of people he knew from the 69th Village made him feel "funny" and "intimidated."

Williams testified that on August 8, 2011, around 1:00 p.m., he and Hudson were standing on International Boulevard between 64th and 65th Avenues. He saw a gray car pass by on the far side of the street, heading towards 64th Avenue. The driver was "mugging" or "looking hard" at him. He recognized the driver as Torrence. People called him "Whoa" or "Little Will." As the car passed, he said "there goes those 69th cats." After the car made a U-turn in front of the market and came back, Williams heard gunshots. He was hit in the head and shoulder and fell to the ground. Later, at the hospital, Williams identified Torrence as the driver and picked his photograph from a photo lineup. He also identified a photograph of the car Torrence was driving. Williams did not see the shooter.

Robert Hudson testified that he was currently in custody based on his failure to appear to testify. He was not happy to be testifying. He acknowledged having been arrested a number of times for selling drugs near the location of the shooting. He initially acknowledged the existence of a feud between 65th Village and 69th Village and testified that "a lot of people" had been shot because of the feud, but he later claimed not to know of such a feud. On the day of the shooting, Hudson was "hanging out" on International Boulevard with Williams. He saw Williams get a scared look and heard Williams say "There goes those 6-9 cats." He turned around, saw a gun and got down. As he hid behind a car he heard more than five shots. At trial, Hudson could not identify the shooter. When asked whether he remembered identifying Denard from a photographic line-up while in the hospital, Hudson said that he could not. He also denied making a follow-up statement to the police in which he again identified Denard or "Laylow" as the shooter.

Oakland Police Sergeant Steven Nowak testified that he spoke to Robert Hudson at the hospital. Hudson was in critical condition and was strapped to a gurney with a tube

in his mouth at the time of the interview. Hudson nodded when Sergeant Nowak asked if he could hear him. When asked if he could identify the people involved, Hudson nodded "yes." When told he would show him pictures of people who may or may not be involved, Hudson again nodded "yes." Hudson looked at all of the photos and, when asked if he recognized anyone, again nodded "yes." When asked if the person he recognized was one of the shooters, he nodded yes. The sergeant pointed to photo number one, and Hudson shook his head "no." When the sergeant pointed to photo number two, which was Denard, Hudson nodded his head "yes." When the sergeant pointed to photo number 3, Hudson again nodded his head "no." Sergeant Nowak moved back to photo number 2, and again Hudson nodded his head "yes." The sergeant asked if Hudson was identifying the shooter and Hudson nodded "yes," and made the number "2" with his hand "by closing his ring finger pinky and thumb."

At trial, Hudson claimed that he identified Denard in the photo lineup because that was the person he saw on the news. He acknowledged that around Denard's picture in the lineup there was a circle and his initials, but stated he did not put them there.

Hudson was also shown a video tape of an interview conducted at the district attorney's office during which he identified Denard as the shooter. In the video, Hudson states that he saw "Laylow" in the window of the car "whipping out the gun." Laylow's real name was Lawrence. He was half way hanging out of the window. Laylow was a "dark skin dude with dreads."

Hudson testified that the tape had been "doctored." He denied that he ever told the police in the interview he knew "Laylow" and testified that he only heard that name from Williams after he left the hospital. Hudson denied that he said on the video tape that he saw "Laylow" with the gun, and he did not tell the police that Laylow's first name was Lawrence. He did not tell the police that Laylow was hanging out the window of the car or that he got a good look at Laylow firing the gun. He did not tell the police that Laylow had dark skin and shoulder-length dreadlocks.

Hudson testified that "Shawn" came to help him immediately after he had been shot. DeShawn was arrested on the night of the shootings for possession of a firearm and

gave a statement the next day. Later, he gave a videotaped interview. Both times he identified Denard as the shooter. At trial, he disavowed his earlier statements. DeShawn did not want to testify at trial. He had been transported from out of state pursuant to a warrant to compel him to testify.

Oakland Police Officer Michael Igualdo testified that a month before the shooting he stopped a 2004 gray Dodge Neon near 62nd Avenue. Torrence was driving but the car was registered to his girlfriend Desiree.

Desiree testified that she owned the Dodge Neon in which Torrence had been stopped earlier in the year. She testified that around 9:00 a.m. on August 8, Torrence dropped her at work in San Jose and left in her Neon. That afternoon, around 2:30 p.m., Torrence called and said he was on his way back to San Jose to return the car.

Video surveillance footage of the area, from two local business establishments, showed the suspect vehicle heading West on International Boulevard, then making a U-turn and coming back Eastbound on International Boulevard.

Denard was arrested at home on August 9, 2011, and Torrence was arrested three days later. Their cell phones were seized at the time of their arrests. An Alameda County District Attorney Inspector testified as an expert on cell phone information and cell phone tower data. He testified that defendants' cell phone data placed them in the vicinity of International Boulevard around the time of the shooting. He also opined that the two phones were "in close proximity of each other during that time period."

Text messages were also recovered, including the following exchange between Torrence's phone and another phone on the night of August 9: Torrence: "they on me . . . you see the news?" Responder: "What, from the Vil?" Torrence: "Yeah." Responder: "Whoa . . . , what you gonna do. I kind knew it was you, but I really didn't know. Did you do the little boy?" Torrence: "Don't talk like that through these texts. You trippin?" Responder: "I just go far away." Torrence: "And keep your mouth closed. Don't tell nobody nothing, please."

Five videos that were taken from Denard's cell phone were played to the jury. In the videos, Denard expressly claims an association with 69th Village. He also displays

handguns, talks of drug dealing, shows scenes of drugs, and talks of shooting rival gang members.

Letters to and from defendants while they were in jail were admitted into evidence. The letters expressly identify Williams or Hudson as the witnesses who identified defendants and threatened retaliation. Torrence repeatedly signs his letters "Whoa" and writes "God forgives, Whoa don't." Copies of Torrence's "writings" while in jail were also introduced into evidence. In one, he states "65 ain't Tha Vill" and "street code names never revealed." In another, Torrence claims to be "from SNV (sixty-ninth village)" and writes of sending people "to the dirt." He also wrote, "If you ever hear Whoa did it, then it got to be right, because nine times out of ten, ima take your life."

Oakland Police Lieutenant Tony Jones testified as an expert on Oakland gangs and gang culture. He testified that there were two gangs within the housing project that runs from 65th Avenue to 69th Avenue, and he described the history of the ongoing feud between the 69th Village and 65th Village gangs. He detailed their turf and testified that the shooting took place in 65th Village's turf. He testified that the primary activities of the 69th Village gang include murder, drug dealing, robberies, and possession of guns.

Photographs of defendants' tattoos were introduced, including Torrence's tattoos which read "Bannon Boys" and "Whoa" and Denard's tattoos which include the numbers "6" and "9." Images recovered from Torrence's social media accounts were also admitted. In one, Torrence can be seen wearing a T-shirt that reads "revenge is a promise, Pooka." Other images show Terrence and Denard "flashing" hand signals associated with the 69th Village gang. Jones explained that Pooka was a 69th Village member who was killed. He also explained the significance of the tattoos to the gang. Jones opined, based in part on their tattoos, material seized from their phones and social media accounts, and statements made to the police, that Denard and Torrence are members of the 69th Village gang. Jones also discussed a number of prior gang-related crimes in which defendants were involved. Jones also opined, based on their tattoos and the location of their prior drug sales, that Williams, Hudson and DeShawn were members of the 65th Village gang. Given a hypothetical question that assumed numerous facts for which there was evidence,

including a daytime drive-by shooting, and "mean-mugging," Jones concluded that such a killing would be gang related. He explained that the crime would serve to enhance the gang's reputation for violence.

The jury found defendants guilty on all counts and found the enhancement allegations true. The murder and attempted murders were found to be of the first degree. The trial court sentenced Denard to a total term of 137 years to life in state prison and Torrence to a total term of 121 years to life in state prison.[3]

Defendants timely filed notices of appeal. While their appeals were pending, defendants' filed petitions for a writ of habeas corpus, which we consolidated with this appeal.[4]

Discussion

I. The Direct Appeal

1. *Batson/Wheeler Challenge*

Defendants, who are African-American males, contend they were deprived of their constitutional rights to equal protection and a representative jury based on the prosecutor's exercise of peremptory challenges to exclude African-American males and

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[3] Denard's sentence was calculated as follows: On count 6, possession of a firearm, the court imposed the three-year upper base term, enhanced by the four-year upper base term for the gang enhancement. The court then imposed 25 years to life on the murder charged in count 1, with a consecutive 25-year-to-life term for the gun use enhancement. The court imposed 15 years to life on the attempted murders, with enhanced minimum terms under the gang allegations, in counts 2 and 3. Those terms were enhanced with 25 years to life for the gun use enhancements. The remaining terms were stayed.

Torrence's sentence was calculated as follows: On count 1, the court imposed a term of 25 years to life, with a consecutive term of 25 years to life for the gun enhancement. On counts 2 and 3, the court imposed seven years to life base terms, consecutive to 25 years to life terms for the gun enhancements. The court imposed the upper base term of three years for the gun possession in count 7, with a consecutive four-year upper term for the gang enhancement under section 186.22.

[4] Defendants' request for judicial notice of the record and pleadings filed in their direct appeals is granted pursuant to the consolidation of these matters.

males in general. (See *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).)

The law is settled. The exercise of a peremptory challenge based solely on a prospective juror's inclusion in a protected classification, such as race or gender, offends the guarantee of equal protection of the laws under the Fourteenth Amendment to the federal Constitution (*Batson, supra*, 476 U.S. 79; *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 315) and a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution (*Wheeler, supra*, 22 Cal.3d at pp. 276-277).

"When a party raises a claim that an opponent has improperly discriminated in the exercise of peremptory challenges, the court and counsel must follow a three-step process. First, the *Batson/Wheeler* movant must demonstrate a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. The moving party satisfies this first step by producing ' "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." ' [Citations.] [¶] Second, if the court finds the movant meets the threshold for demonstrating a prima facie case, the burden shifts to the opponent of the motion to give an adequate nondiscriminatory explanation for the challenges. To meet the second step's requirement, the opponent of the motion must provide 'a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' [Citation.] In evaluating a trial court's finding that a party has offered a neutral basis—one not based on race, ethnicity, or similar grounds—for subjecting particular prospective jurors to peremptory challenge, we are mindful that ' "[u]nless a discriminatory intent is inherent in the prosecutor's explanation," ' the reason will be deemed neutral. [Citation.] [¶] Third, if the opponent indeed tenders a neutral explanation, the trial court must decide whether the movant has proven purposeful discrimination. [Citation.] In order to prevail, the movant must show it was ' "more likely than not that the challenge was improperly motivated." ' [Citation.] This portion of the *Batson/Wheeler* inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness. [Citation.] At this

third step, the credibility of the explanation becomes pertinent. To assess credibility, the court may consider, ' "among other factors, the prosecutor's demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy." ' [Citation.] To satisfy herself that an explanation is genuine, the presiding judge must make 'a sincere and reasoned attempt' to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges. [Citation.] Justifications that are 'implausible or fantastic . . . may (and probably will) be found to be pretexts for purposeful discrimination.' [Citation.] We recognize that the trial court enjoys a relative advantage vis-à-vis reviewing courts, for it draws on its contemporaneous observations when assessing a prosecutor's credibility. [Citation.] We review a trial court's determination regarding the sufficiency of tendered justifications with ' "great restraint." ' [Citation.] We presume an advocate's use of peremptory challenges occurs in a constitutional manner. [Citation.] When a reviewing court addresses the trial court's ruling on a *Batson/Wheeler* motion, it ordinarily reviews the issue for substantial evidence. [Citation.] A trial court's conclusions are entitled to deference only when the court made a 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.' [Citation.] What courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual. '[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.' " (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158-1159.)

In the trial court, defense counsel alleged the prosecution improperly excused 10 male jurors based on a bias against males and African-American males. Nine of those challenges are reasserted on appeal. Seven of the challenges were to prospective

members of the jury and two challenges were to prospective alternates.[5] Two challenges to prospective jury members were to African-American males. The other five challenges to prospective jurors were to males of other races. The final jury was comprised of six women, three of whom were African-American, and six men, none of whom were African-American.

The trial court had "serious doubts" as to whether a prima facie case had been made, but followed the "better practice" and allowed the prosecutor to record his reasons for the challenges. After the prosecutor stated his reasons, the court provided a detailed and well-reasoned explanation for its conclusion that the reasons were gender and race neutral and sincere.

We review the contested peremptory challenges to the seven jurors who were excused from the jury. Initially, we note that although not conclusive, the fact that the jury included six men and three African-American women "is an indication of good faith [by the prosecutor] in exercising peremptories." (*People v. Turner* (1994) 8 Cal.4th 137, 168.)

a. L.A. – African American, Male

The prosecutor gave four reasons for excusing L.A. First, he had been a postal worker for 23 years and the prosecutor opined that "postal workers are traditionally a group that prosecutors have to give a critical eye to, because they operate on an individual basis . . . if they are operating as [a] carrier. They work alone, not with other people. They often then can be viewed as having difficulty in terms of working as a group, coming to a group resolution." Second, the prosecutor thought L.A. "had a very

[5] As the prosecution argues, defendants' challenges to the two prospective alternative jurors are easily dismissed, as no alternatives were substituted into the jury and thus any purported error would be harmless. (*People v. Roldan* (2005) 35 Cal.4th 646, 703 ["Defendant also claims the trial court erred in denying his second *Wheeler* motion regarding Prospective Alternate Jurors G.A. and T.J., but we reject his claim at the threshold. '[Because] no alternate jurors were ever substituted in, . . . it is unnecessary to consider whether any *Wheeler* violation occurred in their selection. Moreover, any *Batson* violation could not possibly have prejudiced the defendant.' "], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

harsh demeanor." He was "an imposing individual [who] gave short curt answers both in his questionnaire and when he was voir dired." Third, he was resistant to answering questions "about his employment" which caused the prosecutor concern because when a juror is "less forthcoming . . . I do not know what is behind that curtain then. I am not going to press him about it, because I will further alienate him, but that refusal is certainly a concern." Finally, he "was falling asleep" when the court was reading the charges and the next day he failed to show up for an entire morning of voir dire.

Initially, defendants fault the court for failing to take into account "the Alameda County District Attorney's Office history of excluding African-Americans from juries." Defendants cite *Miller-El v. Cockrell* (2003) 537 U.S. 322, 347 for the proposition that "the fact that a prosecutor belongs to a district attorney's office with a history of racial bias is a factor to consider in the 'totality of the relevant facts about a prosecutor's conduct.' " Not only did the defense attorneys not make any such argument in the trial court or present facts sufficient to support such a claim, Denard's attorney expressly discouraged the court from considering "things that are outside of our record such as other experiences." Accordingly, this argument has been waived.

Defendants also challenge the sincerity in the prosecutor's concern with L.A.'s employment. It is well established, however, that "[w]hether a prosecutor's generalizations about a given occupation have any basis in reality or not, a prosecutor 'surely . . . can challenge a potential juror whose occupation, in the prosecutor's subjective estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected.' " (*People v. Trinh* (2014) 59 Cal.4th 216, 242.) The trial court found the prosecutor's explanation sincere and we see no evidence of pretext.

Contrary to defendants' argument, the lack of sincerity is not demonstrated by the prosecutor's failure to excuse Juror No. 7, who also worked as a postal carrier. As the Attorney General notes, however, unlike L.A. who worked as a letter carrier for 21 years, Juror No. 7 "retired after having been an engineer with Chevron in Richmond for 36 years. The two years he listed as having been a postal worker, inferably as a student, were a small fraction of his career."

b. S.K. – African-American, Hispanic Male

The prosecutor explained that he excused S.K. in part because of his occupation as a social worker: "This focus on social work then is a concern in that again it is a focus on rehabilitation, not accountability, but on rehabilitation of an individual. It is a focus on giving the benefit of the doubt on reform, not on holding accountable." The prosecutor also observed that S.K. had reported two bad experiences with police and that he had nodded affirmatively when another male juror gave an answer during voir dire that the prosecutor thought was particularly defense-oriented. Finally, the prosecutor was concerned that S.K. would have trouble deliberating because he suffered from bipolar disorder and his "triggers" included "people yelling at me," or "out right rudeness."

As noted above, a prosecutor may properly rely on occupation as a basis for exercising a peremptory challenge. (*People v. Trinh, supra*, 59 Cal.4th at p. 242; *People v. Streeter* (2012) 54 Cal.4th 205, 225 ["[T]he prosecutor could also have reasonably believed that as a social services caseworker, Prospective Juror No. 3 might be more sympathetic to the defense."].) The prosecutor's concerns with the prospective juror's mental health are a second, nondiscriminatory explanation for the challenge. Substantial evidence supports the court's finding that the prosecutor's reasons were sincere.

Defendant's comparison of S.K. to Juror No. 12, who was not challenged by the prosecutor, is inapt. Although Juror No. 12 had an undergraduate degree in psychology, she was a second grade teacher, not a social worker.

c. C.C. – African-American, Male

The prosecutor identified numerous "red flags" in C.C.'s questionnaire, including his attendance for six years at the University of California, Santa Cruz, which the prosecutor described as a "liberal university" with "liberal values," his support of the Sierra Club, the ACLU, Amnesty International and the Union of Concerned Scientists, and the fact that he did not watch television, but listened to "KQED radio news." He also observed that on two different days, C.C. "had [a] disheveled beard, disheveled hair, but he wore bicycle shorts, just bicycle shorts. Tight Lycra or Spandex bicycle shorts to court. That sort of presentation in terms of the formality of this court, wearing shorts to

begin with, but also in terms of wearing bicycle shorts, essentially tight underwear, that caused me concern about him taking the seriousness of this case and certainly, in terms of the appropriateness of this [case], given this is a court of law and given the nature of this case. I should say if I haven't made it clear already, there were nothing covering the bicycle shorts. Nothing covering his genitalia, nothing covering part of his leg, just bicycle shorts." Finally, the prosecutor noted that C.C. had served previously on a hung jury.

Defendants contend that two of the prosecutor's proffered explanations, that C.C. attended the University of California, Santa Cruz and that he sat on a hung jury, were "make-weight and demonstrate purposeful discrimination." We disagree. Fair or not, the prosecutor's characterization of the University of California, Santa Cruz is consistent with C.C.'s other stated interests and is not a sign of bias against all males. The trial court reasonably determined that the proffered reasons were not pretextual.

d. R.M. – No race stated,[6] Male

The prosecutor explained that R.M. "lives alone, he has worked as a scientist . . . . He has never been married. He has no children. I state these factors, because again, there are concerns certainly about a scientist, about over evaluating any particular evidence, over evaluating, overly critical using scientific principles instead of common sense . . . . In addition, the fact that he lives alone, that he has never been married, he has no kids, . . . speaks to a concern in my head about his . . . independence as opposed to working with others."

The prosecutor also explained why he felt differently about R.M. than about other scientists on the panel. The prosecutor pointed out that Juror No. 3 was also a male scientist, but that he "has two daughters and is married. His daughters are of young age. He also had a good answer in his questionnaire regarding the testimony of an expert. That will play heavily in this case. Good answer . . . and a prosecution-oriented answer."

[6] The prospective juror answered "none" to the question asking for race on the questionnaire.

Similarly, as to Juror No. 5, a female scientist, the prosecutor pointed out that she had two sons and that this "distinguished her from [R.M.] particularly with children, her being married, divorced, her having a fiancé, her ability to work with others." Also, Juror No. 5 "had several answers that were prosecution oriented."

Defendants contend the prosecutor's failure to ask R.M any follow-up questions demonstrates the pretext in his explanations. For example, defendants suggest that the prosecutor "could have asked [him] about his employment, whether he had to work in a collaborative manner with others and/or how he resolved conflicts either at work or at home. The prosecutor failed to broach this important subject with the witness. [¶] Lastly, there were no questions by the prosecutor directed to determine whether [R.M.] would be able to exercise common sense or whether he would be 'overly' critical."

The prosecutor, however, "is not required to examine a prospective juror about every aspect that might cause concern before it may exercise a peremptory challenge." (*People v. Jones* (2011) 51 Cal.4th 346, 363.) The failure to question a prospective juror "is of limited significance in a case such as this one, in which the prosecutor reviewed the jurors' questionnaire answers and was able to observe their responses and demeanor, first, during extensive individual questioning by the court and later, during group voir dire." (*People v. Clark* (2011) 52 Cal.4th 856, 906-907) As the trial court observed, the prosecutor "was concerned that because of perhaps the confluence of all of these factors, [R.M.] would be overly critical and would not be capable of exercising common sense, that he would not be able to work well with others. Whether or not [the prosecutor] was right or wrong on that, is not necessarily the point. The point though is, this is in my judgment a valid and race and [gender] neutral [reason] for [the prosecutor] to want to excuse [R.M]. I do not think it is a sham excuse. I think it is a genuine reflection of [the prosecutor's] honest belief that this is not someone was going to work well in the context of jury deliberations." We find no basis to disturb this finding.

e. L.T. – Filipino, Male

The prosecutor explained L.T. was excused because of "two things in his questionnaire that I determined were significant enough to cause me to question his

ability to be prosecution oriented in this case and his view of the evidence." First, L.T. stated "brother-in-law went into trial, was accused of molesting his step-daughter, not convicted" and that L.T. "attended [the] trial of brother-in-law." Second, he believed in the "fairness and effectiveness of the criminal justice system" "if the verdict was decided without any doubt." The prosecutor explained his concerns as follows: "One, that he went to his brother-in-law's trial, that his brother-in-law took a case to trial and was found not guilty by jurors would obviously create questions in my mind as to [his] comfortableness with the criminal justice system and [its] ability to effectively, to charge people that are guilty of a crime. [¶] . . . What's more that he has stated that his burden of proof for me would be higher than what the law indicates only would he decide the verdict, if it was decided without any doubt. And again, I think this is probably in reference to his brother-in-law and perhaps feelings about his brother-in-law's trial and him being unfairly tried. I did not want to question him about that for fear of tainting this jury with his answer and replies to that. . . . I exercised a peremptory on that basis."

Again, defendants' contend that the prosecutor's failure to ask the prospective juror questions about his concerns indicates the pretext of the explanation. As with the prior juror, the trial court again concluded that the prosecutor legitimately believed that the prospective juror would "hold the prosecutor to a significantly higher burden of proof" than the law requires. We perceive no basis to disturb the trial court's finding.

f. B.M. –White, Male

The prosecutor noted that B.M was young, liberal, had no children and no attachment to the community. The prosecutor explained that B.M. had lived in numerous places and had been in Alameda County only for roughly two and a half years, and that he preferred jurors who have strong attachment to the community. The prosecutor also was concerned about B.M. having volunteered with Vista, which B.M described as a program of AmeriCorps. The prosecutor explained that he knew about AmeriCorps from friends and roommates in law school, and that it "is geared towards serving the underprivileged. It is often volunteered to by people that have a social bent that are looking for the rehabilitative process in our culture that are less law and order."

Defendants fault the trial court for relying on its own experiences to validate the prosecutor's concerns about the prospective juror's volunteer work with AmeriCorps. The court explained, "My experience has been that AmeriCorps is, membership in that group is not uncommonly the subject of discussion of voir dire and that the perception is widely held by the prosecution that it is a liberal agency whose goals are social justice and rehabilitative as opposed to accountability, and that I think it is and I hold that it is a legitimate and gender neutral reason to excuse the juror who has volunteered for, to work in this type of organization." In assessing the credibility of the proffered explanation, the court, however, "may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her." (*People v. Lenix* (2008) 44 Cal.4th 602, 613.)

g. G.R. – Filipino, Male

The prosecutor pointed to G.R's questionnaire, in which he answered the question as to his "feelings about the fairness and effectiveness of the criminal justice system," by stating, "It is intrinsically biased to the poor and minorities." To the question of what came to mind when he thought of prosecutors and defense attorneys, both times G.R replied, "biased." The prosecutor explained, "His belief and the use of the word intrinsically . . . left no qualification, no room for variations rather, his feelings that it is intrinsically. I determine that to be indelibly, unalterably so biased against the poor and minorities. He told me that he entered into his role as a juror with a perceived notion that I, representing the system in great part was biased against poor and minorities." Given the opinions expressed in the questionnaire, the lack of follow-up questions does not, as defendants' suggest, show pretext or bias.

Thus defendants' *Batson/Wheeler* challenges were properly overruled.

2. *Hudson's identification of Denard as the shooter was admissible*.

Denard contends that evidence of Hudson's identification of him while in the hospital and of his selection of his photograph from the "six-pack" photo array were inadmissible, and that defense counsel was ineffective in failing to object. The Attorney

General argues that the evidence was admissible as prior inconsistent statements and that even if inadmissible, there could be no prejudice because Denard has not challenged the admissibility of Hudson's subsequent unequivocal identification of Denard as the shooter during Hudson's interview with the police.

" 'A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.' [Citation.] 'The "fundamental requirement" of section 1235 is that the statement in fact be inconsistent with the witness's trial testimony.' [Citation.] ' "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement. . . ." ' " (*People v. Cowan* (2010) 50 Cal.4th 401, 462, fn. omitted.) " 'Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, . . . [w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 711.) We review the trial court's rulings on the admissibility of inconsistent statements for abuse of discretion. (*People v. Homick* (2012) 55 Cal.4th 816, 859.)

Here, Hudson unequivocally testified at trial that he did not see who fired the gun. He stated, "I wasn't paying attention to who was holding it. I seen that gun and got low." Hudson's hospital identification of the shooter is at odds with this trial testimony. His prior identification is also inconsistent with his trial testimony regarding the photographic line up. Hudson initially testified that he did not recall being shown the photographic lineup and could not recall identifying the shooter; he later said that he had never seen the photographs and did not identify a person in the lineup as the shooter. There was no error in admitting this contradictory evidence.

3. *The admission of DeShawn's testimony did not violate Denard's confrontation rights.*

Denard contends that DeShawn's testimony, including his impeachment with prior statements to the police in which he identified Denard as the shooter, was admitted in violation of his confrontation rights. At trial, DeShawn made plain that he did not want to testify and that he was doing so only because he had been arrested when he failed to appear in response to a subpoena. DeShawn responded "I don't know" or "I don't remember" to the vast majority of the questions asked on direct and cross-examination. To impeach DeShawn, the prosecutor read numerous prior inconsistent passages from DeShawn's statements to the police, each of which DeShawn disavowed. Further, the prosecutor was allowed to play for the jury the recording of the statements DeShawn had made to the police. Although DeShawn never admitted that he made the statements read into evidence by the prosecutor, the prosecutor argued that the prior statements were true and that his identification of the defendants was solid.

Denard contends that DeShawn's refusal to answer questions prevented defendants from cross-examining him "on important topics, such as how much time he had to observe the car as it drove by, where specifically he was located, what he was actually looking at, [and] whether the 'identification' was valid or whether [Denard] merely looked familiar to [DeShawn]." Denard argues that the lack of opportunity to cross-examine DeShawn resulted in a violation of his constitutional right to confront the witness testifying against him. The Attorney General suggests that defendants' argument is flawed because they "do not distinguish between, on the one hand, a flat refusal to testify, and, on the other hand, the situation here, where [the witness] did testify, but did so with evasiveness and hostility."

"The Sixth Amendment right of confrontation secures a defendant's right of cross-examination. [Citation.] The right of confrontation 'has long been read as securing an adequate opportunity to cross-examine adverse witnesses.' [Citation.] ' "[T]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the

defense might wish.' " [Citations.]' [Citation.] [¶] That opportunity may be denied if a witness refuses to answer questions, but it is not denied if a witness cannot remember. A witness who 'refuses to answer any question on direct or cross-examination denies a defendant the right to confrontation which contemplates a meaningful opportunity to cross-examine the witness. [Citations.]' [Citations.] [¶] By contrast, a witness who suffers from memory loss—real or feigned—is considered 'subject to cross-examination' because his presence and responses provide the 'jury with the opportunity to see [his] demeanor and assess [his] credibility.' " (*People v. Foalima* (2015) 239 Cal.App.4th 1376, 1390-1391; see also *People v. Homick, supra*, 55 Cal.4th at p. 861 ["While [witness's] refusal to answer defendant's counsel's questions 'narrowed the practical scope of cross-examination, [his] presence at trial as a testifying witness gave the jury the opportunity to assess [his] demeanor and whether any credibility should be given to [his] testimony or [his] prior statements. This was all the constitutional right to confrontation required.' "].)

Defendants were provided an opportunity to cross-examine DeShawn and he did respond substantively to some of defense counsel's questions. He admitted he was near the scene of the shooting and that he heard the shots but denied having seen the shooter or the car driving by. He also admitted he was angry that his friends had been shot and that he did not want his friends to be hurt, but denied that he wanted to pin the crime on someone as a result. He did not remember being arrested after the offense or offering to give the officers information about the shooting if they would let him go home. Thus, the jury was given an opportunity to observe his demeanor and judge his credibility.

Even assuming that the failure to strike DeShawn's testimony was error, it was harmless beyond a reasonable doubt given the other evidence that established Denard's guilt. (*Chapman v. California* (1967) 386 U.S. 18.) DeShawn's testimony merely buttressed Hudson's identification of Denard as the shooter. Cynthia's description of the shooter as a dark-skinned African-American man with shoulder length dreadlocks provided further confirmation of Hudson's identification. No prejudice resulted from the admission of DeShawn's testimony.

4. *Videos found on Denard's cell phone were properly admitted against both defendants*.

The trial court admitted five videos from Denard's cell phone. Two of the videos were made the day of the shooting, two a few days earlier and one a few months before the shooting. In each of the videos, Denard and others can be seen displaying firearms and can be heard repeatedly using offensive language, including racial and homophobic slurs and demeaning statements about women. Torrence is not visible in any of the videos although it is possible he is referenced by name in the video made several months prior to the shooting.[7] The videos were played in full for the jury and portions of the videos were replayed when the firearms expert testified regarding the firearms shown in the video, the police investigator identified where the videos were made and in connection with the testimony of the gang expert. The videos were also replayed during closing argument.

Initially, Torrence contends the videos were admitted in violation of *Bruton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518. "The *Aranda*/*Bruton* rule addresses the situation in which 'an out-of-court confession of one defendant . . . incriminates not only that defendant but another defendant *jointly charged*.' [Citation.] 'The United States Supreme Court has held that, because jurors cannot be expected to ignore one defendant's confession that is "powerfully incriminating" as to a second defendant when determining the latter's guilt, admission of such a confession at a *joint trial* generally violates the confrontation rights of the nondeclarant.' " (*People v. Brown* (2003) 31 Cal.4th 518, 537.) As the Attorney General argues, in *People v. Washington* (2017) 15 Cal.App.5th 19, 23, the court recently held that "the United States Supreme Court's subsequent narrowing of the Sixth Amendment right to confront and cross-examine witnesses to protect against only 'testimonial' statements—as accomplished in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and its progeny—also narrowed the *Aranda/Bruton* doctrine." The court explained that "the *Aranda/Bruton* doctrine is grounded exclusively in the confrontation clause and can

[7] In the April 29 video, someone refers to "Pretty Boy Will" and says "He's a shooter too."

extend no farther than the metes and bounds of the clause defined by the United States Supreme Court." (*Id*. at p. 29.) In his reply, Torrence questions, without further argument, whether "*Crawford* so severely limits the Sixth Amendment's Confrontation Clause." Since there is no dispute that the videos made by Denard are not testimonial, we agree with the Attorney General that Torrence's rights under the Sixth Amendment were not infringed by the admission of this evidence.

Torrence also contends that the contents of the videos should have been excluded pursuant to Evidence Code section 352 as their prejudicial effect greatly outweighed any probative value as to him. He argues that the court abused its discretion in denying his motion for separate trials on this basis and, alternatively, that his trial attorney rendered ineffective assistance in failing to request a limiting instruction.

Contrary to Torrence's argument, we see no basis to disagree with the court's finding that the videos were not unduly prejudicial. As the Attorney General notes, the videos had probative value in the case against Torrence. "[T]he evidence was probative on the nature of the 69th Avenue Village gang. Both appellants repeatedly attempted to show that the 69th Avenue Village was merely a geographic location, which the residents viewed with pride. They tried to explain their tattoos, and the statements they made in writing and in pictures and videos, as merely showing local loyalty. Denard's videos plainly showed that the 69th Avenue Village was a gang which engaged in drug sales, and violent retribution and expansion of territory. These facts were a strong indication of motive. The reason Denard and Torrence shot the victims in this case was to expand their drug selling territory, and to eliminate drug selling rivals. Denard proclaimed these motives vividly in the videos." The trial court reasonably concluded that this probative value was not outweighed by any purported prejudice. The court did not see the "passing references to inappropriate treatment and attitudes towards women, or attitudes reflecting disdain for persons of a different sexual persuasion or a similar type, rise to the level of undue prejudice which will so inflame this jury, crying out for emotional response and hatred from the jurors, that they will no longer follow the instructions of the court and they can no longer be fair and impartial to the defendants." Given the clear probative

value of the videos and the trial court's reasonable estimate of the potential prejudice, we find no error in the admission of the evidence and agree with the trial court that separate trials were not warranted.

Finally, any error with respect to the failure to request a limiting instruction was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As stated above, much of the evidence was admissible against Torrence. Moreover, to the extent that any part of the video might have been subject to a limiting instruction, given the overwhelming evidence of Torrence's participation in the crimes, there is no likelihood that the absence of a limiting instruction impacted the verdict in any way.

5. *Evidence of Torrence's prior acts of domestic violence was properly admitted.*

In Desiree's rebuttal testimony, the prosecutor questioned her about prior instances in which Torrence had committed domestic violence against her. Desiree admitted that on November 10, 2010, Torrence grabbed her by the neck and threw her onto a couch. She was asked about a statement she signed in November stating that Torrence punched her and that both sides of her face and her eyes were swollen. She testified she did not recall the incident. She also denied that she wrote or signed a statement indicating that she did not report him because she was scared and did not want to be the reason that he goes to jail. Finally, she was questioned about an incident on May 12, 2011, in which she and Torrence argued when she told him he could not use the Neon and he hit her with a closed right hand. She admitted the argument, but denied that Torrence hit her.

In seeking to admit the evidence, the prosecutor noted that Desiree seemed to be withholding information that she knew about the crimes and Torrence's friends and his "lifestyle." The prosecutor asked that the evidence be admitted as impeachment to explain why Desiree might be reluctant to say more to the jury and to show that she was testifying as Torrence had told her to.[8] The court admitted the evidence with the

[8] Contrary to the Attorney General's contention, the record supports the inference that an objection was properly made and overruled.

following limiting instruction: "I am allowing [evidence] for a limited purpose. The limited purpose is, it is not received for the truth of the matter referred to. It is only admitted for this limited purpose, that is, whatever effect it has, if any, on the state of mind of this witness as the witness is testifying. . . . [¶] . . . At the end of the case, I will remind you of evidence that was admitted for a limited purpose, and you are to consider it only for that limited purpose." The trial court reiterated the instruction in the closing instructions.

Torrence contends the domestic violence evidence was not properly admitted as impeachment because Desiree's "state of mind was not relevant. She was not evasive and her testimony was very favorable to the prosecution and unfavorable to [him]." He argues further that the evidence was unduly prejudicial. Whether Desiree's testimony was sufficiently evasive to place her mental state at issue and support admission of this evidence is a question soundly within the trial court's discretion. (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 887.) We cannot say on this record that the court abused its discretion in so finding. Nor do we find the evidence unduly prejudicial. Finally, given the overwhelming evidence of Torrence's guilt, any potential error in the admission of this evidence is harmless. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

6. *Any error with respect to the admission of gang evidence was harmless.*

Defendants make numerous arguments with regard to the admission of gang evidence at trial. Defendants argue: (1) the trial court abused its discretion by failing to act as a "gatekeeper" as required by *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*); (2) the admission of case specific testimonial hearsay by Lieutenant Jones violated defendants' confrontation rights under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*); and (3) the admission of excessive gang evidence deprived defendants of a fair trial in violation of their Federal and State rights to due process.

a. The trial court did not abdicate its "gatekeeping" duty.

In *Sargon, supra,* 55 Cal.4th 747, the court delineated the scope of a trial court's substantial responsibility to exclude improper expert testimony. "[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon*, pp. 771-772.) The focus of the trial court's gatekeeping function is not on the conclusions reached by the expert but rather on the reliability of the principles and methodology applied to generate them. (*Id.* at p. 772; see also *People v. Stamps* (2016) 3 Cal.App.5th 988, 994 [Trial courts "are charged with an important gatekeeping 'duty' to exclude expert testimony when necessary to prevent unreliable evidence and insupportable reasoning from coming before the jury."].)

Prior to trial, Denard made a motion to limit the testimony of the prosecution expert under *Sargon* and requested that the court hold an evidentiary hearing to determine the basis of Lieutenant Jones's opinions in this case. The court denied the request for the evidentiary hearing. The court acknowledged that "trial courts have a substantial gatekeeping responsibility" and that "this is a responsibility that . . . has been accepted and welcomed by the trial courts in California for many, many years." The court concluded, however, that an evidentiary hearing was not necessary in this instance. The court explained that it relied on a number of factors in denying the requested hearing, including that the witness had been extensively examined and cross-examined and was qualified as an expert at the preliminary hearing. The court also considered the substantial body of case law regarding admissibility of gang experts and concluded that the witness's proffered testimony was a proper subject of expert testimony and that the materials he relied on are those that an expert may reasonably rely on in forming an opinion. Based on the above, the court concluded that "the gatekeeping responsibility of this court, the Superior Court of Alameda County, has been accepted and has been correctly applied, and I see no need to have what I perceive to be a duplication of what occurred at the preliminary examination. [¶] [Denard's defense attorney] was personally present,

personally engaged in a lengthy and focused cross-examination of Lieutenant Jones after Lieutenant Jones was subject of an equally focused and direct examination by [the prosecutor]. That function has taken — that procedure has taken place. I don't see any necessity to do it again, especially in view of the state of the law in California which I must consider when I apply the *Sargon* standard. There is no need for a 402 hearing in this case." The trial court also noted this ruling was not "the end of the road." The court acknowledged that as the trial progressed there would be opportunity to revisit the "gatekeeping" issue with regard to specific evidentiary objections and that all parties would have an opportunity to voir dire the witness before he was designated an expert at trial.

Contrary to defendants' argument, the trial court did not abdicate its gatekeeping responsibility by relying on the magistrate's determination at the preliminary hearing. The court repeatedly stated that the court was independently evaluating the admissibility of the expert's testimony under the *Sargon* standard. To do so, the court reasonably relied on the testimony previously given at the preliminary hearing in order to avoid unnecessary delay and duplication of efforts. The court did not abuse its discretion in concluding that an evidentiary hearing was not required *at that time*. (Evid. Code, § 802 ["The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."].) Moreover, as noted above, the court indicated that it would revisit the matter as necessary as the trial progressed.

On appeal, defendants do not identify any specific opinion that was premised on faulty or unreliable principles or methodology. Instead, they argue generally that in California, " 'gang' testimony by law enforcement has been admitted under the theory that it is expert opinion 'in the field of gang sociology and psychology.' [Citation.] Sociology and psychology are disciplines that are based on the scientific method. Jones never testified that he had taken classes in sociology but that he did take a class or classes in psychology. None of the psychology classes related to gang culture. [¶] Therefore, because Jones was lacking 'the same level of intellectual rigor that characterizes the

practice in the relevant field,' namely psychology and sociology, the court should have never allowed Jones to testify." However, the use of police witnesses as gang experts in criminal cases in California is well established. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370 ["The use of expert testimony in the area of gang sociology and psychology is well established."]; *People v. Gardeley* (1996) 14 Cal.4th 605, 617 ["The subject matter of the culture and habits of criminal street gangs . . . meets [the requirements of Evidence Code section 801.]"], disapproved on different grounds by *People v. Sanchez, supra,* 63 Cal.4th 665, 686, fn. 13.) Indeed, it has long been recognized that the knowledge that renders one an expert for this purpose need not be acquired from scientific studies or academic endeavors, but may be acquired simply from experience. (*Estate of Toomes* (1880) 54 Cal. 509, 514.) We see no basis to revisit the issue here.

b. Any error under *Sanchez* is harmless.

As set forth above, the prosecution alleged the offenses charged in this case were committed for the benefit of, at the direction of, or in association with a criminal street gang. (Pen. Code, § 186.22, subds. (b)(1)(C), (b)(4).) "In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) As the parties recognize, the legal landscape with regard to the admissibility of expert gang testimony changed significantly following the California Supreme Court's decision in *Sanchez, supra,* 63 Cal.4th 665, which was issued well after the trial was completed in this case.

In *Sanchez, supra,* 63 Cal.4th at page 679-686, the Supreme Court held the Sixth Amendment right to confront and cross-examine witnesses limits an expert witness from relating case-specific hearsay content in explaining the basis for his or her opinion. The court advised that "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the

prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is testimonial hearsay." (*Id*. at p. 680.) The court reaffirmed that "[g]ang experts . . . can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception. What they cannot do is present, as facts, the content of testimonial hearsay statements." (*Id*. at p. 685.)

Here, the Attorney General acknowledges that some of Lieutenant Jones's testimony was improper under *Sanchez*, but contends that the "bulk" of his testimony was admissible and that the erroneous admission of any testimonial hearsay was harmless beyond a reasonable doubt under *Chapman v. California*, *supra*, 386 U.S. 18. We agree that defendants were not prejudiced by the erroneous admission of limited testimonial hearsay.

Denard concedes that "there was no confrontation problem with testimony regarding general gang description or a description of the gang's conduct or its territory." He argues, however, that "there was a confrontation problem with the prosecutor's use of case-specific testimony as to [defendants'] police contacts to prove [their] intent to benefit the gang when committing the underlying crimes," as well as to establish their "*present* gang membership and any monikers" that they may have used. Even assuming that the evidence objected to by defendants was improperly admitted, the other evidence that defendants were active members of the 69th Village gang and that the crimes were committed for the benefit of the gang was so overwhelming that the failure to exclude this evidence was harmless beyond a reasonable doubt.

Here, Jones's background information on the 69th Village and 65th Village gangs, including turf and history, was confirmed by the victims' testimony. The victims' membership in the 65th Village gang is established by William's tattoos and by the fact

that the victims were selling drugs in 65th Village turf, which Jones permissibly opined would not be allowed if they were not associated with that gang. Denard's tattoos and the videos on his phone overwhelmingly establish that he was an active member of the 69th Village gang and that the shooting was committed in association with the gang for the purpose of retaliation against or intimidation of the 65th Village gang. Likewise, Torrence's tattoos, the photograph of him in a T-shirt promising revenge for the death of a 69th Village gang member, his social media posts and his writings in prison all establish his active participation in the 69th Village gang and that the crime was committed with the requisite intent. There is no likelihood that defendants would not have been convicted had the testimonial hearsay been excluded.

Defendants also contend, as they did in the trial court, that the admission of Jones's testimony rendered their trial fundamentally unfair. They argue that the testimony created "a real danger" that the jury would infer they "had committed other crimes and would commit other crimes in the future unless convicted of these crimes," and that they "posed a danger to at least every law-abiding citizen of Alameda County" and thus should be punished whether or not they committed the charged crimes. We disagree.

For the same reasons that the admission of some evidence inadmissible under *Sanchez* was harmless, the constitutional argument fails. As just indicated, considerable evidence of the gang activities and defendants' active participation in the gang was properly admitted. Compared to this evidence, the testimonial hearsay, including the specific details of defendants' prior gang-related police interactions, was simply not that shocking or prejudicial. The evidence of defendant's guilt is overwhelming. There is no likelihood the jury was punishing defendants for other past or potential crimes. Although Denard disputed that he was the shooter, both Hudson and DeShawn identified him as the shooter soon after the shooting. Although they refused to confirm those identifications at trial, the evidence was nonetheless persuasive. Moreover, their identification is consistent with Cynthia's description of the shooter, particularly his noticeable dreadlocks. Torrence's identity as the driver was also convincingly established by William's identification immediately after the shooting and at trial, and by the fact that at the time

of the crimes he was in possession of the car used in the crimes. Likewise, although he disputed his knowledge and intent at trial, the evidence provided a strong basis to conclude that he was aware of and actively supported Denard's shooting. The testimony was clear that Torrence stared at Williams as he drove past, then made a U-turn and drove slowly past the victims as Denard was firing the gun. The erroneous admission of some gang evidence did not deprive defendants of a fair trial.

7. *The admission of Torrence's statements in his jail intake form was harmless*.

An Alameda County sheriff's deputy testified that he interviewed Torrence in March 2011 to determine his housing. During the interview, Torrence stated that he was "69th Village," and that his subset was "Bannon Boys." These answers along with a description of Torrence's tattoos were documented in his intake forms.

Torrence asserts that admission of the form and testimony were improper under *People v. Elizalde* (2015) 61 Cal.4th 523, in which the Supreme Court held that the Fifth Amendment prohibited admission of gang-related statements made by defendants in jail intake interviews, such as occurred here. The Attorney General concedes that Torrence "appears to be correct that the evidence was admitted in error" but argues the admission was harmless because defendant's gang membership was established beyond a reasonable doubt by other admissible evidence. (See *id.*, at p. 542 ["The erroneous admission of a defendant's statements obtained in violation of the Fifth Amendment is reviewed for prejudice under the beyond a reasonable doubt standard."].) We agree. Torrence's gang membership is established beyond question by the admissible portions of the gang expert's testimony, the photographs of his tattoos, his social media account and his jailhouse writings in which he claimed membership in the 69th Village gang.

8. *Torrence was not entitled to an instruction on the lesser related offense of accessory after the fact*.

Torrence contends the trial court erred in refusing his request for an instruction on accessory after the fact. He suggests the facts, as argued in closing argument, support a reasonable inference that he did not know that Denard intended to commit the shooting

before it happened but that, after the shooting, he aided Denard in escaping. However, being an accessory after the fact would be a lesser related offense to the offense charged, and not a lesser included offence, so that giving the instruction would have been " 'proper only upon the mutual assent of the parties.' " (*People v. Rangel* (2016) 62 Cal.4th 1192, 1230.)

Torrence acknowledges that the prosecutor objected to the instruction. He argues that the prosecutor's explanation for his objection (that the facts did not support the instruction) somehow negated the need for mutual assent. Regardless, the prosecutor clearly did not agree that the instruction be given, so the instruction was properly denied.

Moreover, as the Attorney General explains, any possible error in this respect was undoubtedly harmless. Torrence was convicted of first degree murder and of two counts of malicious discharge of a firearm from a motor vehicle under an aiding and abetting theory. As defendant admits, conviction required that "the jury believe[] beyond a reasonable doubt that he knew, or should have known, that his passenger possessed a firearm and that he intended to discharge it into a crowd." Having been found guilty under that instruction, the absence of an instruction on the theory that Torrence was an accessory after the fact could not have had any effect on the verdict.

9. *Defendants were not denied their right to a public trial.*

During the afternoon session on June 4 the court ordered any spectators who were on felony probation to leave the courtroom.[9] At the close of the day, the court indicated that it wanted to re-evaluate that order and the following morning the court rescinded the order. While the order was in effect only two witnesses testified. The police inspector assigned to investigate this case completed his testimony (consisting of approximately 10

[9] The court also noted that it was distracting when spectators came and went from the courtroom while the trial was in session and ordered that spectators no longer be allowed to do so. Defendants do not challenge this clearly permissible order. (*People v. Esquibel*, *supra*, 166 Cal.App.4th at p. 552, citing *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121.)

of 140 pages of transcript)and Jones testified to his background and experience as a police officer prior to being offered as an expert (approximately 33 pages of transcript).

Denard contends that the exclusion of those on felony probation, even for the limited duration, was an improper "partial closure" of the courtroom that requires reversal of his convictions. Alternatively, he argues that this court should "consider a lesser remedy, such as reversal of the gang allegations and a reversal of all counts that Jones's testimony substantially impacted." We disagree.

A criminal defendant has a constitutional right to a public trial, including the presence of friends or relatives. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 13; *In re Oliver* (1948) 333 U.S. 257, 271-272; *Waller v. Georgia* (1984) 467 U.S. 39, 44; *People v. Esquibel* (2008) 166 Cal.App.4th 539, 551, 553.) Violation of the right to a public trial is a reversible per se error. (*People v. Woodward* (1992) 4 Cal.4th 376, 381.) However, the temporary exclusion of select supporters of the accused does not necessarily violate the constitutional right to a public trial. (*People v. Esquibel*, *supra*, at p. 552; *People v. Bui* (2010) 183 Cal.App.4th 675, 688.)

People v. Bui, *supra*, 183 Cal.App.4th 675 is instructive. In that case, three spectators, including two of the defendant's family members, were excluded by a bailiff from the courtroom for about 40 minutes during jury selection. (*Id*. at p. 679.) After the trial court was advised of the situation, the problem was rectified and the courtroom was opened to all who wanted to be present. (*Id*. at p. 686.) On appeal, the defendant maintained his right to a public trial had been violated and reversal was required. The appellate court made clear that, while it did not condone the exclusion of any person from the proceedings, the short period of exclusion did not constitute a per se violation of the defendant's right to a public trial. The court explained, "Given what we find to be the de minimis nature of the temporary exclusion of these individuals from only a limited portion of voir dire, we likewise find, as did the Supreme Court in [*People v*.] *Woodward* [(1992) 4 Cal.4th 376, 383-385], that this 'temporary "closure" did not violate defendant's fundamental constitutional right to a public trial.' " (*People v. Bui*, *supra*, 183 Cal.App.4th at pp. 688-689.)

The exclusion of felony probationers in this case was similarly de minimis and did not result in a denial of defendants' right to a public trial. Defendants' failure to address the limited nature of the police inspector's testimony that was given while the exclusion was in effect underscores its lack of importance. Lieutenant Jones's testimony during the exclusion included only the prosecutor's expert voir dire examination. The exclusion order was lifted before defense counsel questioned Jones regarding his expert qualifications and before Jones offered any substantive testimony. While the exclusion should never have been ordered, the court corrected itself before any prejudice can be presumed or the error can be deemed a per se basis for reversal.

10. *Prejudicial Prosecutorial Misconduct*

Denard asserts four instances of alleged prosecutorial misconduct. "The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

a. Officer Johnson

At trial, the prosecutor asked Police Officer Johnson whether she heard anyone say who the shooter was while at the scene of the shooting. Johnson replied, "I did not hear anyone say any names." When asked whether she heard "anyone say Laylow was

the shooter," Johnson responded "not from the victims, but I did hear that name. And, like I said, it was a crowd of people standing in the area, and at that time the name wasn't really familiar to me." Defense counsel objected and the court struck the answer. Although the jury was not immediately admonished, the court later instructed the jury not to consider the stricken testimony for any purpose and to treat it as though it had never been uttered. Whether or not asking the question rises to the level of misconduct, which we seriously question, there is no reason to believe the jury disregarded the clear admonition from the court or that any prejudice resulted.

b. Robert Hudson

Denard contends the prosecutor committed misconduct by failing to correct Hudson's false testimony that he had not received any monetary payment from the prosecution and by failing to produce available documentation of the payments. Any misconduct in this respect was also harmless. Inspector Cruz testified that Hudson received two $400 payments in 2011 to cover relocation costs in exchange for his agreement to testify at trial. It is also undisputed that the prosecutor informed defense counsel about the payments prior to trial, albeit without producing the documents, and that after defense counsel received the documents, Hudson was recalled and questioned about the payments.

c. Cell Phone Expert

As set forth above, the cell phone expert opined that the cell phones associated with the defendants were in close proximity to each other at the time of the shooting. The prosecutor then asked the expert for the basis of his opinion. The expert answered, "Due to the start time of the calls that we have applied and the in time and you are talking two different separate networks that have a lot of their own antennas, don't necessarily share all the sites with each other, that in combination with the above, I just mentioned, I would say they were definitely together." The prosecutor emphasized, "[d]efinitely together. Thank you . . . . Those are the only questions I have."

Denard contends the expert's testimony that the phones were "in close proximity" and "definitely together" is patently false and that the prosecution committed misconduct

by asking questions calling for inadmissible answers or by intentionally eliciting inadmissible testimony. The expert's testimony, however, was not misleading or false. The expert testified that when making or receiving a call, a cell phone will activate the tower that has the strongest signal, which is usually the closest tower to the phone. He explained further, that the sector of the tower that is activated indicates the direction from which the signal is coming. Given a record showing a call that activated sector 6 of a particular cell tower, the expert could locate the address of the tower, divide the tower into six sectors of 60 degrees each, and map the triangle shaped area served by a particular sector of the tower. He noted that he was "not at all trying to say that that phone was definitely right in that area. It just represents . . . what portion of that tower serviced the call." On cross-examination, the expert clarified that "you can never say where a phone is exactly" and "the cell phone technology . . . cannot pinpoint the location of a person with a phone." The prosecutor's questions were not misconduct.

d. Burden of Proof

Denard contends that the following closing argument by the prosecutor improperly lowered the burden of proof: "During the very beginning of the prosecutor's argument he stated the following; '[a]nd there's a couple of starting points when you look at the evidence in this case. The judge will instruct you that you have a duty to be reasonable, and if one interpretation of the evidence appears to be reasonable and the other interpretation appears to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. You must decide, when you listen to me, to the defense attorneys, what makes sense, what is reasonable, and what simply doesn't add up in your minds.' [¶] During his final closing argument, the prosecutor stated, '[i]f the evidence points you — you are to decide what the evidence shows here, but if the evidence points you to only one reasonable explanation, that's exactly what the law asks you to decide. Reject the unreasonable and accept the reasonable. That's exactly the black and white letter law that you will be given. That's not shifting of any burdens.' [¶] Later on the prosecutor said, '[n]ow, again, you come back to this. This interpretation of the evidence. And what I wanted to show, but this is — it doesn't apply with just each piece of

evidence. In other words, you don't assess every piece of evidence, whether it is the cell phone records or the efforts to intimidate witnesses or the gang evidence, and you look at it by itself and determine, well, I have a reasonable explanation here and a reasonable explanation there. I got to go with the one with innocence. That's not the way it works. The law says you take the whole case, look at the whole case as one interpretation, reasonable and the other unreasonable. If so, you must accept the reasonable."

In *People v. Centeno* (2014) 60 Cal.4th 659, 672, the court held that "it is error for the prosecutor to suggest that a 'reasonable' account of the evidence *satisfies the prosecutor's burden of proof*." The court explained, "Here, the prosecutor's argument began with what the jury could consider: reasonably possible interpretations to be drawn from the evidence. While this is an acceptable explanation of the jury's starting point, it is only the beginning. . . . The standard of proof is a measure of the jury's level of confidence. It is not sufficient that the jury simply believe that a conclusion is reasonable. It must be convinced that all necessary facts have been proven beyond a reasonable doubt. [Citation.] The prosecutor, however, left the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden. The failure of the prosecutor's reasoning is manifest." (*Ibid*.)

Contrary to Denard's argument, the prosecutor's argument in the present case does not suffer from the same defect. As quoted, the prosecutor expressly stated that determining reasonableness of the evidence was a starting point in the jury's deliberations. As the Attorney General notes, this argument was made largely in rebuttal to defense counsel's reliance on the circumstantial evidence instruction during his closing. Among the prosecutor's final words to the jury was a reminder that "[t]he burden of proof is beyond a reasonable doubt. You all know that. It has been stated several times. It is no magic formula. It is no far-reaching standard that is impossible. It is the same burden that is used in every criminal case in this courthouse and in every other courthouse in the country, the city, state and country. It is the same burden that is used in every conviction. And it is far exceeding in this case." The court's instructions of course also made clear the correct standard. There was no misconduct.

11. *The trial court did not err in denying Denard's posttrial motion to relieve retained counsel*.

Following the return of the jury's verdict on June 23, 2014, the trial court set Denard's sentencing for July 22, 2014.

On July 7, 2014, Denard's counsel made a motion to withdraw. She pointed out that the motion was not dependent on a *Marsden* type showing of ineffective assistance, but rather was appellant's absolute right, absent a showing of prejudice to the parties or the court. She argued that there would be no prejudice or undue delay because it would take only a short time, perhaps 20 days, for new counsel to get up to speed on the case and to be able to file the new trial motion, and prepare for sentencing. The prosecutor objected, noting that given the size of the record, it would take competent counsel weeks if not months to review. The prosecutor also noted that he had spoken to the reporter, who stated that a "conservative estimate for the amount of time it would take to just process the transcripts of the trial alone, would be approximately three months."

The trial court denied the motion, explaining that "it would result in significant prejudice to the defendant and . . . would result in disruption of the orderly process of justice." The court agreed that "At a minimum, [it] is going to require [new counsel] months of time to review those transcripts and to carefully delineate and determine in his or her mind which motions are appropriate, which motions perhaps are not, things of this nature" and that "a six months to a year continuance of this matter to bring in a new attorney who has never seen this case before, or has no intimate familiarity with it is simply unconscionable." The court found that both defendant and the family of the young victim would suffer prejudice if the motion were granted. Denard challenges the denial of his motion.

A criminal defendant has the right to discharge a retained attorney, with or without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) "A nonindigent defendant's right to discharge his retained counsel, however, is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes

of justice' [citations] . . . . [T]he 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state interest against which the Sixth Amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time." ' The trial court must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' " (*Id*. at pp. 983-984.)

Defendant here demonstrated no compelling reason for discharge of the attorney, and the disruption to orderly process that discharge would necessarily have entailed seems undeniable. There was no abuse of discretion in the court's well-reasoned explanation for the denial of Denard's motion.

II. The Habeas Petitions

Defendants contend the prosecution violated its discovery obligation under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) (1) by failing to disclose that DeShawn had a juvenile record and that he was a suspect in a murder that took place in October 2011, and (2) by failing to alert the defense to the existence of impeaching information regarding Oakland Police Sergeant Mike Gantt and gang expert Lieutenant Tony Jones. Denard also contends his counsel rendered ineffective assistance by failing to move to suppress evidence recovered in the search of his girlfriend's home.

1. *Brady Violation*

" 'The federal due process clause prohibits the prosecution from suppressing evidence materially favorable to the accused. The duty of disclosure exists regardless of good or bad faith, and regardless of whether the defense has requested the materials. [Citations.] The obligation is not limited to evidence the prosecutor's office itself actually knows of or possesses, but includes "evidence known to the others acting on the government's behalf in the case, including the police." [Citation.] [¶] For *Brady* purposes, evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching a

prosecution witness. [Citations.] Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. [Citation.] Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. [Citations.] Because a constitutional violation occurs only if the suppressed evidence was material by these standards, a finding that *Brady* was not satisfied is reversible without need for further harmless-error review.' " (*People v. Cordova* (2015) 62 Cal.4th 104, 123-124.)

a. DeShawn's Criminal History

Denard contends the prosecution violated his constitutional rights by failing to provide discovery of DeShawn's juvenile file.[10] The Attorney General argues that any failure to produce the file was not material because defense counsel was aware of the existence and contents of the file. (See *People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, 716 ["if the prosecution provides the defense with, or if the defense otherwise has, sufficient information to obtain the evidence itself, there is no *Brady* violation"]; *People v. Salazar* (2005) 35 Cal.4th 1031, 1049 [evidence is not suppressed when it "is available to a defendant through the exercise of due diligence"].) The record establishes that prior to trial the prosecution informed defense counsel that DeShawn had "no known adult convictions for felony or misdemeanor crimes of moral turpitude" and that he had "only one arrest for a crime involving moral turpitude. This arrest is documented in OPD 11-038710 and previously provided." Although DeShawn's juvenile record was not disclosed, the police report of DeShawn's arrest, which was disclosed, indicates that Deshawn had a sustained juvenile petition in November 2010 for resisting arrest. Moreover, Torrence's counsel in the present case represented DeShawn in those juvenile proceedings. Accordingly, any failure to disclose DeShawn's juvenile record

[10] DeShawn's juvenile record indicates that a petition was filed alleging he had committed numerous felonies, including assault with a deadly weapon and attempted murder, based on a police report which indicated that he had fired a hand gun at a the occupants of a moving car. The petition was sustained in November 2010 based on his admission to evading arrest and the remaining allegations were dismissed.

was not material because defense counsel was aware of both the existence and content of DeShawn's juvenile record and chose not to pursue the matter.

Insofar as defendants assert that the failure to investigate DeShawn's juvenile record constitutes ineffective assistance of counsel, the absence of prejudice negates the claim. The jury knew that DeShawn offered to provide information regarding the shooting after being arrested for possession of an assault weapon shortly after the shooting. DeShawn's association with the 65th Village gang was well established at trial so that the jury was aware of any potential motivation this may have provided to identify Denard as the shooter. Denard's argument that the jury would have reached a different verdict had it also known about his involvement in the prior shooting is purely speculative. He argues, "Had [DeShawn] seen who was in the car, as he had told authorities previously, and known that the car had been involved in the shooting, he would have used the weapon that he possessed, the automatic weapon, to shoot at the car and its occupants who had injured his companions. Because he did not, it is reasonably probable that he did not actually see who was in the car, and only told the police he did because he wanted to avoid custody." Given his gang membership and possession of an assault weapon, this argument could just as well have been made with or without evidence of DeShawn's participation in a shooting as a juvenile.

Next, defendants contend the prosecution failed to disclose that two months prior to trial, the Oakland Police Department learned from a confidential informant that DeShawn may have been involved in an October 2011 murder. The Attorney General argues the information was not material because the information would not have been admissible to impeach DeShawn. Assuming, however, that DeShawn might have been asked about his participation in a prior shooting, it is highly improbable that this additional information would have impacted the jury's verdict. As set forth above, Deshawn's motives to falsely identify Denard were well established. The suggestion that he may have had an additional reason to lie because he knew he had previously participated in a murder for which he had not yet been charged is entirely speculative. There is no basis to believe he would have refused to testify, in breach of his agreement

with the prosecution, had he known he might be questioned about his participation in the prior crime for which he had not yet been charged. There is no reasonable probability that the result of the trial would have been different had Deshawn been impeached with the additional information regarding his criminal history. We cannot agree with defendants that the verdict is "not worthy of confidence."

b. Mike Gantt

Defendants contend the prosecution violated its obligation under *Brady* by failing to disclose three pieces of information contained in Gantt's personnel file: (1) he was fired, but later reinstated, based on his alleged interference with a rape investigation in 2004; (2) he was recently placed on administrative leave based on allegations that he allowed his girlfriend to write or transcribe reports in a 2013 murder investigation; and (3) in 2014 Gantt filed a complaint against Lieutenant Jones, and other members of the police department's homicide unit, after receiving racist text messages.[11]

The Attorney General disputes that any of these incidents implicated Gantt's credibility and involved discoverable misconduct. The Attorney General argues further that the failure to disclose this information was not material in any event given Gantt's limited role in the investigation in this case. "Sergeant Gantt *did not testify* in the case, and none of his brief investigatory contact with the case found its way into substantive evidence. 'Because there was no testimony to impeach, defendant's *Brady* claim is without merit.' (*People v. Williams* (2013) 58 Cal.4th 197, 258.)"

In his response, Denard argues that the information in Gantt's file was material because it painted the "Oakland Police Department in a very bad light, and would have substantially impinged the credibility of the gang expert, Lieutenant Jones." However, as detailed below, Gantt did not file his complaint against Jones until after conclusion of the trial. At the risk of stating the obvious, the prosecution could not have disclosed text messages that did not exist.

[11] The Attorney General disputes the characterization of the texts as racist. Insofar as the texts can reasonably be viewed as exhibiting racial bias, we will treat them as such for purposes of determining prejudice on appeal.

c. Lieutenant Tony Jones

Defendants contend that the "Alameda County District Attorney knew that there were problems with Jones and the racist texts that he sent to fellow officers" but "did not inform trial counsel or [appellate] counsel [of] any information it had regarding what Jones's personnel records might contain regarding this explosive allegation." Defendants note that in August 2016, while this appeal was pending, defense counsel requested from the prosecution "All documents related to Oakland Police Lieutenant Tony Jones and the racist texts (Klu Klux Klan photographs) he allegedly sent to M. Gantt, and appearing in a broadcast of ABC news, and any other investigation undertaken by the Alameda County District Attorney regarding him." The district attorney replied that it did not have any discovery to disclose in response to the request.

The texts disclosed in the 2016 news reports appear to have been sent in July 2014. The jury had rendered its verdict in this case in June 2014. Other exhibits show that Gantt first complained about the texts in August 2014, "two weeks after" defendants had been sentenced. Nothing in the record establishes that the texts were sent prior to conclusion of the trial.

The District Attorney's response to counsel's August 2016 request for disclosure was faultless. As noted above, "if the prosecution provides the defense with, or if the defense otherwise has, sufficient information to obtain the evidence itself, there is no *Brady* violation." (*People v. Superior Court (Johnson), supra,* 61 Cal.4th at p. 716.) "[T]he prosecution has no *Brady* obligation to do what the defense can do just as well for itself." (*Id.* at p. 715.) The court explained, "the prosecution and the defense have equal access to confidential personnel records of police officers who are witnesses in a criminal case. Either party may file a *Pitchess*[12] motion, and either party must comply with the statutory procedures to obtain information in those records. Because a defendant may seek potential exculpatory information in those personnel records just as well as the prosecution, the prosecution fulfills its *Brady* obligation if it shares with the defendant

[12] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531

any information it has regarding whether the personnel records contain *Brady* material, and then lets the defense decide for itself whether to file a *Pitchess* motion." (*People v. Superior Court (Johnson), supra,* at p. 716.)

Here, the defendant's discovery request indicates that the defense was aware of the allegations regarding Jones's racial bias. The decision whether to seek discovery of that evidence by way of a *Pitchess* motion was within their discretion.[13] (*People v. Superior Court (Johnson), supra*, 61 Cal.4th at p. 718 [setting forth the "several advantages . . . to having the defendant use the *Pitchess* procedures to acquire exculpatory material in confidential personnel records rather than require the prosecution to do so"].) The prosecution had no further obligation with respect to disclosure of this information.

2. Ineffective Assistance of Counsel

Denard contends his trial attorney failed to provide constitutionally effective assistance when she failed to file a motion to suppress evidence recovered in the search of the Pheasant Drive residence. Denard does not dispute that a warrant was issued for the search of the property. He argues, however, that the officers did not act in good faith in relying on the warrant because it was "so lacking in indicia of probable cause that it rendered official belief in its existence unreasonable." Denard argues that "there was no nexus between the crime, the things to be seized, and the place to be searched." He notes that the warrant did not identify any named person as the occupant of the residence and stated only that another suspect who was arrested with Denard had been seen entering the apartment, while Denard waited outside.

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[13] In *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100, 1108, the court held that Penal Code section 1054.9, which allows for pre-habeas corpus discovery, authorized a *Pitchess* motion. The court required defendant to show, however, that the requested records were material to his habeas corpus petition, not to his defense to the underlying prosecution. (*Id*. at pp. 1105, 1110 [noting that a *Pitchess* motion must " 'set[] forth the materiality [of the desired personnel records] *to the subject matter involved in the pending litigation*' "].) We express no opinion whether such a motion would be appropriate in this instance and note that defendants have failed to explain how evidence that Jones's testimony was tainted by a racial bias would entitle them to relief.

To prevail on a claim of ineffective assistance of counsel, defendant must establish that his counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Additionally, when, as here, an ineffective assistance claim is predicated on counsel's failure to bring a motion to suppress evidence on Fourth Amendment grounds, the defendant " 'must also prove that his Fourth Amendment claim is meritorious.' " (*People v. Wharton* (1991) 53 Cal.3d 522, 576, citing *Kimmelman v. Morrison* (1986) 477 U.S. 365, 375.)

It is highly doubtful that Denard's showing would have been sufficient to overcome the good faith exception to the exclusionary rule. "Evidence obtained by police officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate is ordinarily not excluded under the Fourth Amendment, even if a reviewing court ultimately determines the warrant is not supported by probable cause. [Citation.] This is commonly referred to as the good faith exception to the exclusionary rule. However, the good faith exception to the exclusionary rule is inapplicable if 'the affidavit was " 'so lacking in indicia of probable cause' " that it would be " 'entirely unreasonable' " for an officer to believe such cause existed.' [Citation.] 'The question is whether "a well-trained officer should reasonably have *known* that the affidavit failed to establish probable cause (and hence that the officer should not have sought a warrant)." [Citation.] An officer applying for a warrant must exercise reasonable professional judgment and have a reasonable knowledge of what the law prohibits. [Citations.] If the officer "reasonably could have believed that the affidavit presented a close or debatable question on the issue of probable cause," the seized evidence need not be suppressed.' " (*People v. Garcia* (2003) 111 Cal.App.4th 715, 723.)

Moreover, even if the evidence might have been suppressed, Denard has not established a reasonable probability that the outcome at trial would have been different. While the guns and gang paraphernalia seized helped to establish his access to guns and his gang membership, Denard's access to weapons and gang membership was well

documented in his social media postings and the images and videos recovered from his phone.

Disposition

The judgment is affirmed and the petitions for writ of habeas corpus are denied.

Pollak, Acting P.J.

We concur:

Siggins, J.
Jenkins, J.